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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROMIE R. EDENS, JR.,

Petitioner,

v.

GEORGE L. KENNEDY, individually and/or in his capacity as a Senior Trooper for the West Virginia State Police

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Court of Appeals erred in granting qualified immunity to a state trooper when, upon finding that the fenced, locked and posted curtilage to the home was entitled to Fourth Amendment protection, nonetheless found the right had not been clearly established despite the provision of a state statute providing trespass protection against such intrusions?**

II. **Whether the Court of Appeals erred in not publishing an opinion where it recognized, in its view for the first time, that police violate this Fourth Amendment when entering fenced, locked and posted curtilage areas, so as to allow a qualified immunity defense to be available to law enforcement personnel who continue to violate that right?**

III. **Whether the Court of Appeals erred in granting summary judgment to defendant trooper when a qualified document examiner opined that the warrant had not been signed by a magistrate creating a genuine issue of material fact concerning the authentication of the warrant, even though the signed report was not notarized, when a sworn deposition subsequently was submitted?**

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OPINIONS AND ORDERS BELOW

The opinion and order of the Court of Appeals for the Fourth Circuit affirming the order of the District Court granting summary judgment to defendant police officer, dated August 4, 2004, was not reported and appears at Appendix p. 3A. Reconsideration was denied on August 31, 2004, per order appearing at Appendix p. 2A. The panel consisted of Fourth Circuit Chief Judge Wilkins, Circuit Judge Motz and Senior Circuit Judge Beam, sitting by designation for the Eighth Circuit. The opinion and order of the District Court for the Southern District of West Virginia, dated September 18, 2003, denying reconsideration appears at Appendix p. 41A. The initial opinion and order of the same District Court, granting summary judgment to defendant police officer, dated August 6, 2003, appears at Appendix p. 26A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Fourth Circuit entered August 4, 2004. Rehearing was requested but was denied on August 31, 2004. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner claims violations of the Fourth, Fourteenth Amendments to the United States Constitution and the West Virginia Code Sections 61-3B-1(4),(6),(7) and (8):

> Amendment IV: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In relevant parts, the West Virginia Statutes complained of provide:

W.Va. Code Section 61-3B-1(4) (in part); It shall not be necessary to give notice by posting on any land or place not exceeding five acres in area on which there is a dwelling house or property that by its nature and use is obviously private in order to obtain the benefits of this article pertaining to trespass or enclosed lands.

W.Va. Code Section 61-3B-1(6); "Fenced land" is that land which has been enclosed by a fence of substantial construction, whether with rails, logs, post and railing, iron, steel, barbed wire, other wire or other material, which stands at least three feet in height.

W.Va. Code Section 61-3B-1(7); Where lands are posted, cultivated or fenced as described herein, then such lands, for the purpose of this article, shall be considered as enclosed and posted.

W.Va.Code Section 61-3B-1(8); (in part)
"Trespass" under this article is the willful unauthorized entry upon, in or under the property of another, but shall not include the following:

(a) Entry by the State, its political subdivisions or by the officers, agencies or instrumentalities thereon as authorized and provided by law.

STATEMENT OF THE CASE

This case is a civil rights action under 42 U.S.C. §1983 arising from an alleged illegal search and entry upon the private property of the Plaintiff Romie Edens by the Defendant, Senior Trooper George L. Kennedy of the West Virginia State Police. The complaint, filed on October 5, 2001, also alleged two state tort counts for invasion of privacy and trespass. It was alleged that the Trooper entered onto the property illegally and without proper authority, allegedly obtained a search warrant based upon false information, wrongfully invaded the privacy of the Plaintiff, harassed him illegally, and sought to prevent the Plaintiff's exercise of his right to petition the government or otherwise have access to the courts.

The case was assigned to the Honorable Charles H. Haden II, of the United States Court for the Southern District of West Virginia who initially denied Defendant's Motion to Dismiss. Following discovery, Defendant filed a Motion for Summary Judgment which was granted by Judge Haden on August 6, 2003. A motion for reconsideration was filed on August 19, 2003 and denied on September 19, 2003. Subsequently, an appeal was taken to the Fourth Circuit Court of Appeals. Following oral argument, the panel, consisting of Chief Judge Wilkins, Circuit Judge Motz and Senior Circuit Judge Beam, affirmed the grant of summary judgment. While the panel found that the police officer violated

the property owner's Fourth Amendment rights, it nonetheless granted qualified immunity. The panel also chose not to publish the opinion.

The facts of the case follow:

On or about October 6, 1999, Senior Trooper George L. Kennedy trespassed upon the residence and property of Plaintiff Romie Edens, Jr. The trooper entered the property of Eden's without an arrest warrant, initially without a search warrant, without consent or justification under the law.

Defendant Kennedy, allegedly acting on behalf of a tip from an anonymous informant, crossed the locked and fenced driveway and other property of the defendant. App. 369a-387a. While walking across the yard without consent or other privilege, he approached the inoperable front door area of plaintiff's house. App. 261a. At that time, he claimed to observe six marijuana plants in a "blue pot." App. 948a. The officer moved the plants to the road where he photographed and confiscated the plants.

According to Trooper Kennedy's report (page 2, paragraphs 3 and 4, App. 947a), not only was the anonymous caller very in-depth in his description of the home, he also gave precise directions to the residence. The caller also informed him of the mailing address of the home.

Trooper Kennedy also stated in his report that "this officer" (referring to himself in the singular) traveled to Utah Road in Sissonville and using the anonymous caller's directions, located the suspect's residence exactly where the caller stated that it would be. Further, "this officer" (singular) noted that the anonymous caller had given an exact description of the exterior of the suspect's home." Trooper Kennedy also states in his report that he confirmed the mailing address in which the anonymous caller

supplied to "this officer." App. 947a.

These statements in the Trooper's report would lead a reasonable person to believe that Trooper Kennedy had no problem locating the suspect's house and the only way for Trooper Kennedy to confirm the mailing address to the home was by looking at the mailbox that was located on the west side of the driveway, at the entrance of the driveway (see Defense Exhibit 2, App. 527a), not in front of the house as Trooper Kennedy stated in his deposition. App. 370a. Trooper Kennedy also states in his report that he noted that the driveway to the suspect's residence was locked so he walked through the yard area and approached the front of the house. In doing this, Trooper Kennedy not only crossed a closed and locked gate, he passed two "No Trespassing" signs that were clearly in his view. App. 937a, 938a.

Yet in Trooper Kennedy's deposition, he stated that he walked through a "walkway" at the opposite end of the fence. In doing this, Trooper Kennedy had to remove a pallet placed there by the Plaintiff in order to enter the property. App. 938a. In doing this he opened an area which the Plaintiff had blocked to keep things inside the property in, and to keep things outside the property out.

Subsequently, the trooper alleged that he traveled to Kanawha County Magistrate Court, submitted an affidavit for a search warrant based upon information from the anonymous caller and evidence previously seized at Eden's home. App. 432a, 940a.

Information provided in the affidavit for the search warrant was "tainted" by the initial unlawful seizure. Further no effort was made to verify the anonymous caller's reliability. More specifically, the caller alleged to know that there were over 50 marijuana plants at Eden's residence because he worked for the electric company and had installed a meter box the day before. In fact, the electric company does not install meter boxes. Edens

depo., App. 212a. A check with the electric company would have revealed this false statement. Additionally, the allegation from the anonymous caller that 50 marijuana plants were growing in portable pots behind the residence had proven false when the officer circled the property as part of his illegal trespass. Further, before the warrant, an aerial search of the property revealed no contraband. Frye depo., App. 570a.

Following receipt of the search warrant, obtained on the basis of false and/or tainted information, defendant Kennedy, together with four other members of the West Virginia State Police, returned to Eden's residence. The officers gained entry through a side window of the dwelling and searched the interior of the home, but found no evidence of illegal activity. App. 949a.

Additionally, outside the scope of the search warrant, the defendant and his fellow officers also searched the outbuildings located on Eden's property, but found nothing unusual or illegal. App. 949a, 954a.

No timely return of the search warrant was made and properly filed. Edens depo. App. 191a-192a.

Contrary to practice and regulation, no report of criminal investigation was made until on or about January 24, 2000, several months after the incident and following publication of an article entitled, "Dog fight may have led to pot setup." See App. 415a, 943a, 945a.

The trooper brought no charge against plaintiff. According to his report, no charges were brought for the following reason: Based on Eden's cooperative attitude, no prior drug history, and his personal request to submit to a polygraph examination, compounded with the fact that no evidence was obtained from within the residence that could possibly link the marijuana in the

portable container to being grown within the home, this officer did not arrest Edens. App. 950a.

Nonetheless, in the aforementioned article, Kennedy was quoted as saying, "Since the amount of marijuana was small he didn't charge Edens, although he could have and believes he could have obtained a conviction." App. 944a

The charges were forwarded to the Kanawha County prosecuting attorney's office for review. It is noted that plaintiff Edens had informed the officer that he had a feud with his neighbor, Kanawha County Chief Investigator who worked for the prosecuting attorney's office. Edens and/or his girl friend had filed charges against the investigator alleging trespass together with a civil damage claim for restitution growing out of injuries to their dog.

At all times, Edens maintained that some other party placed the pot with the marijuana plants at his doorstep. However, police records identify the pot as blue in the criminal report, but inconsistently as "lime green" in the property return. App. 957a, 948a, 370a-371a. Defendant Trooper informed Edens that the portable pot was not available for examination and has presumably been lost or thrown away, inhibiting Edens' ability to determine the identity of the party attempting to frame him. App. 279a.

The actions of the defendant trooper deprived plaintiff of his civil rights including but not limited to the following:

> a. Defendant entered the premises at the Plaintiff's residence, without an arrest warrant, initially without a search warrant, without a court order, or otherwise without any legal authority whatsoever and conducted an improper search and seizure contrary to the Fourth and Fourteenth Amendment guarantees of the United States Constitution.

b. Subsequently, defendant obtained a search warrant based upon tainted and/or false information, contrary to the Fourth and Fourteenth amendments.

c. Wrongfully invaded the privacy of the plaintiff by means of the improper trespass, illegal entry, search and seizure, as previously outlined, contrary to the Fourth and Fourteenth Amendment protections.

d. Sought to prevent or chill the exercise of the right to petition the government and or otherwise have access to the courts by retaliatory conduct in determining that charges would not be brought by him but nonetheless submitting the same to officials who he knew or should have known harbored animus and bias against the plaintiff.

e. Arbitrary police conduct serving to harass the plaintiff constitutes a violation of the Fourteenth Amendment.

These actions allegedly have served to deprive the Plaintiff of his civil rights, as previously outlined, under color of law and hence a violation the United States Constitution and are actionable under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether a qualified immunity defense is available to a state trooper who crossed a fenced, locked and posted curtilage area, contrary to the express provisions of a state statute. Equally important, this Court is requested to grant certiorari to disapprove and change the practice whereby the recognition that law enforcement violates a right is noted in an unpublished opinion,

thereby allowing the qualified immunity defense to continue to be available for further violation of the same rights.

As evidenced by this instant opinion, the Fourth Circuit Court of Appeals appears to have adopted a policy of virtual immunity for law enforcement officers accused of violating the civil rights of citizens. This policy consists of the following components:

(1) Strict interpretation of the pre-existing established law, requiring an earlier case consisting of facts extremely close to the case at issue as well as failing to apply applicable statutory provisions.

(2) Failing to give effect to available factual inferences to the non-moving party on summary judgment motions so as to be reluctant to find genuine issues of material fact for jury submissions.

(3) Even when finding that the facts establish a civil rights violation, declining to publish the opinion, so as not to create a precedent which could serve as pre-existing established law to defeat a future qualified immunity defense.

When law enforcement is convinced that they cannot be found legally responsible for misconduct in civil court, an unhealthy environment is created whereby there is virtually no enforcement of vital civil rights which are in place for the protection of the citizenry against the potential for governmental abuse. The strict views evidenced in the Fourth Circuit serves to

create such an environment.[1]

This unpublished opinion of the Fourth Circuit Court of Appeals should be reviewed for the following reasons:

The opinion states that the Court applied the standard set out in Wilson v. Layne, 526 U.S. 603, 609 (1999), with regard to the defense of qualified immunity asserted by the appellee, George L. Kennedy. (Opinion , p. 3). The standard shields government officials from liability for conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (emphasis added). And the key to said standard is a determination of "...whether that right was clearly established at the time of the alleged violation." *Id.* However, the Court fails to discuss or acknowledge the existence of the West Virginia trespass statute which had been cited to the Court below.

The Code provides:

> i) **W.Va Code Section 61-3B-1(4)** (in part); It shall not be necessary to give notice by posting on any land or place not exceeding five acres in area on which there is a dwelling house or property that by its nature and use is obviously private in order to obtain the benefits of this article pertaining to trespass or enclosed lands.
>
> ii) **W.Va. Code Section 61-3B-1(6);** "Fenced land" is that land which has been enclosed by a fence of substantial construction, whether with rails, logs, post and

[1] Counsel's twenty-eight year legal career has been spent primarily within the Third Circuit Court of Appeals. However, local members of the bar have opined that the Fourth Circuit "never met a qualified immunity it didn't like."

railing, iron, steel, barbed wire, other wire or other material, which stands at least three feet in height.

iii) **W.Va. Code Section 61-3B-1(7)**; Where lands are posted, cultivated or fenced as described herein, then such lands, for the purpose of this article, shall be considered as enclosed and posted.

This West Virginia Statute clearly confirms that property which is enclosed or fenced is entitled to complete privacy protection and prohibits unauthorized trespass, W.Va. Code § 61-3B-1(8).

The significance of this statute, which had previously been quoted in the Appellant's Brief becomes clear in the context of the portion of the unpublished opinion which confirms that the officer's entry on the Edens property was a likely Fourth Amendment violation. The rationale in this portion of the opinion is important and accordingly is here quoted verbatim:

> Edens' final argument with respect to this claim is that his clear declaration of his intent to exclude strangers from his property rendered and "knock and talk" unlawful, regardless of Kennedy's motivation. We hold that Kennedy's entry onto Edens' property may have violated the Fourth Amendment but that Kennedy was nevertheless entitled to summary judgment on qualified immunity grounds.
>
> Our analysis begins with the precept that the curtilage is entitled to the same Fourth amendment protection as the home. *See* Oliver v. United States, 466 U.S. 170, 180 (1984); Rogers, 249 F.3d at 287. This does not mean, however, that limits on access

to the home and the curtilage are equivalent. Access to the home is strictly forbidden in the absence of a warrant or exigent circumstances. *See* Payton v. New York, 445 U.S. 573, 590 (1980). In contrast, police officers ordinarily may enter the curtilage in order to approach the home without implicating the constraints of the Fourth Amendment. *See* Alvarez, 147 F.3d at 357.

We hold, however, that if the owner of a home encloses the curtilage with a fence, locks the gate, and posts "No Trespassing" signs, the effect for Fourth Amendment purposes is to extend the walls of the home to the edge of the curtilage. This is because the act of scaling the property creates an elevated expectation of privacy. *Cf.* California v. Ciraolo, 476 U.S. 207. 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))); Alvarez, 147 F. 3d at 357 (discussing reasonable expectations of privacy with respect to curtilage).

In the absence of a fence with a locked gate, a homeowner is likely to receive visits from pollsters, door-to-door salespeople, and trick-or-treaters, among others. There is no constitutional basis for excluding police officers from this list of potential visitors. *See* Rogers, 249 F. 3d at 289-90 ("[P]olice officers do not need a warrant to do what any private citizen may legitimately do-approach a home to speak to the inhabitants.") Nevertheless, the homeowner can reasonably expect all such visits

to cease when he has manifested his intent to exclude strangers by sealing the property around his home and posting "No Trespassing" signs. Thus, in the absence of a warrant or exigent circumstances, a police officer may not lawfully breach a locked enclosure around the curtilage. *See* State v. Brocuglio, 779 A.2d 793, 800 (Conn. App. Ct. 2001) (holding that police violated Fourth Amendment by entering backyard enclosed by stockade fence posted with "No Trespassing" and "Keep Out" signs), *aff'd*, 826 A.2d 145 (Conn. 2003); State v. Ridgway, 790 P.2d 1263,1265 (Wash. Ct. App. 1990) (holding that marijuana recovered from doorstep was subject to suppression because police observed marijuana only after walking around closed gate across driveway and evading guard dogs while approaching house).

We emphasize that our holding is a narrow one. In particular, we do not hold that all enclosed areas are off limits to the police. An enclosed area outside the curtilage may be subject to warrantless intrusions even if the owner has posted "No Trespassing" signs. *See* Oliver, 466 U.S. at 176-84 (holding that the Fourth Amendment did not apply to searches conducted in enclosed areas remote from the defendants' homes). And, even within the curtilage, the police may traverse a fence if there is no clear indication that the homeowner intended to exclude uninvited visitors. For example, in Rogers, we upheld an entry into the curtilage for the purpose of conducting a "knock and talk" even though the property in question was surrounded by a fence and a privacy hedge. *See* Rogers, 249 F.3d at 293, 294. But if a fence within or around the curtilage is

> locked and posted with signs in order to prevent access, this "manifest[s] an objective intent that the area be preserved as private." Brocuglio, 779 A.2d at 800. When such intent would be apparent to a reasonable officer, the police may not enter the enclosed area without a warrant or exigent circumstances. (Opinion, pp. 7-9)

Despite the clear implication that Officer Kennedy may have violated the Fourth Amendment, the Court of Appeals nonetheless held that the defendant was entitled to qualified immunity. The analysis for qualified immunity requires a review of preexisting law to determine whether knowledge of the right will be imputed to the officer. In the opinion of the panel no law in West Virginia or the Fourth Circuit Court clearly established that right. The panel's rationale follows:

> We have found only one case decided before October 6, 1999 (the date of the intrusion at issue here) that squarely supports Edens' claim. *See generally* State v. Ridgway, 790 P.2d 1263 (Wash. Ct. App. 1990). Ridgway was decided by an intermediate court in Washington State, and it therefore did not create clearly established law of which a reasonable officer in West Virginia should have been aware. *See* Wilson v. Kittoe, 337 F. 3d 392, 402-03 (4th Cir. 2003) ("In determining whether a right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." (alteration and internal quotation marks omitted)). Moreover, Ridgway stands in contrast to numerous cases upholding the entry of police officers into areas

> enclosed by fences or marked with "No Trespassing" signs. *See* Vanessa Rownaghi, Comment, *Driving into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U.J. Gender Soc. Pol'y & L. 1165, 1183-85 (2003) (discussing cases). Although those cases are factually distinguishable, and thus do not preclude us from reaching the holding we have announced today, they do not support Edens' claim either. Accordingly, although Kennedy's entry on Edens' property may have violated the Fourth Amendment, Kennedy is entitled immunity. We therefore uphold the entry of summary judgment on Edens' claim arising from the first intrusion onto his property. (Opinion, p.97)

It is respectfully submitted that the panel failed to consider the West Virginia trespass law cited above. The panel appears concerned that there are cases in other jurisdictions that are factually distinguishable that permit police officers to enter into areas enclosed by fences or marked with no trespassing signs. Clearly, the West Virginia statute is relevant and squarely on the point that the existence of the fencing, is a matter of expressed West Virginia policy for many years, would fill the gap at least with regard to West Virginia law enforcement officers. Here the Fourth Circuit clearly established in Rogers v. Pendleton, 249 F.3d 279 (4th Circuit 2001) the limitations on the circumstances under which police may validly search the curtilage of the residence. That case established that the curtilage protection preexisted 1999. Hence the only remaining issue is whether or not the law was clearly established to alert a West Virginia state trooper that a fenced and locked yard area was surrounded by a heightened expectation of privacy. Since West Virginia statutory law clearly defines the unauthorized entry on such fenced land as a trespass, it cannot fairly be said that the law was not clearly established when

Trooper Kennedy wrongfully entered Edens' property.

Several other cases make it clear that the curtilage is a protected area, especially under the circumstances of this case. The case law squarely supports Edens' claim that Kennedy had no authority to enter Edens' property is "clearly established". If the owner of the property expressly forbids entrance onto his property, i.e. by fencing and posting his property, officers have no authority to enter the property without probable cause, exigent circumstances or a search warrant. Edens heightened his expectation of privacy by locking the entrance to his property.

In Rogers v. Pendleton the officers relied on Tobin for the proposition that their contemplated search of Rogers' curtilage was reasonable in light of clearly established law. The Eleventh Circuit has held "that reasonable suspicion cannot justify the warrantless search of a house, but it can justify the agents' approaching the house to question the occupants." United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991). The fourth circuit stated that the officer's reliance on Tobin was misplaced. Tobin opinion cited as authority Davis v. United States, 327 F.2d 301 (9th Cir. 1964) in which the Ninth Circuit stated that "[a] bsent express orders from the person in possession, "officers may" walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof." Id. at 303. Thus Tobin itself, on which the officers rely, cites approvingly as the basis for its holding, a case stating that the right to approach the home and knock on its door to question the occupants is inapplicable in the presence of contrary "express orders" from the person in possession." The officers also relied on Unites States v. Searle, 974 F.Supp. 1433 (M.D. Fla. 1997).

The Searle court found that probable cause and exigent circumstances supported the entry onto the curtilage of the home but held alternately that "[w] here police have a reasonable

suspicion and approach a house to question the occupants thereof, their conduct does not violate the Fourth Amendment" Id. at 1440. Searle, however, fits neatly within the obvious rational of Tobin; just as private citizens may approach a home, absent contrary instructions from the owner to knock on a door, so may the police approach without probable cause, a warrant or exigency.

The Fourth Circuit went on to state that "indeed, the cases the officers rely upon say simply that police officers do not need a warrant to do what any private citizen may legitimately do - - approach a home to speak to the inhabitants."

In United States v. Cephas (4th Cir. 2001) the fourth circuit stated "as we recently reiterated in a case involving officers having knocked at the defendant's door in order to, under court order, return a hand gun taken from him at an earlier traffic stop, observed evidence of criminal wrongdoing through the front window of the defendant's house: Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned violation of the person's right of privacy, for any one openly and peaceably . . . to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof - - whether the questioner be a pollster, a salesman, or an officer of the law. United States v. Taylor, 90 F.3d 903, 909 (4th Cir. 1996) (quoting Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).

In this case, there is no evidence that Cephas's act of initially opening his door to Sergeant Shapiro was anything but voluntary. The officer first knocked at the front door of the house in which Cephas reportedly rented an apartment. A woman answered and said that a man named Cephas rented an upstairs apartment. When Sergeant Shapiro then walked from the front door of the house up the stairs to Cephas's apartment door, he

apparently did so through an area common to the several separate apartments in the house, an area where any pollster or salesman could have presented himself.

In Florida v. Riley, 488 U.S. 445 respondent Riley lived in a mobile home located on five acres of rural property. A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. Corrugated roofing panels, some translucent and some opaque covered the greenhouse. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.

This case originated with an anonymous tip to the Pasco County Sheriff's office that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not see the contents of the greenhouse from the road, he circled twice over respondent's property in a helicopter at the height of 400 feet.

California v. Ciraolo, 476 U.S. 207 (1986) was the controlling case in this case. In California v. Ciraolo the Supreme Court recognized that the yard was within the curtilage of the house, that a fence shielded the yard from observation from the street, and that the occupant had a subjective expectation of privacy. We held, however, that such an expectation was not reasonable and not one "that society is prepared to honor." Id., at 214. Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion." (emphasis added). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of

Fourth Amendment protection." Id., at 213, quoting Katz v. United States 389 U.S. 347, 351 (1967). As a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be," 476 U.S., at 213. Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was. The Supreme Court arrived at the same decision in Riley, stating that "Riley no doubt intended and expected that his greenhouse would not be open to public inspection and the precautions he took protected against ground-level observation."

It is also noted that the district court granted summary judgment on the pendent state law trespass claim on the basis that Trooper Kennedy's actions did not violate the curtilage protections. Page 19 of Judge Haden's Opinion provided as follows:

> State law trespass claims
>
> *West Virginia Code* § 61-3B-1(8)(a) provided "'Trespass' under this article is the willful unauthorized entry upon, in or under the property of another, but shall not include the following: (a) Entry by the State, its political subdivisions or by the officers, agencies or instrumentalities thereof as authorized and provided by law." Id. Having determined the Trooper Kennedy's actions were lawful under the Constitution of the United States, the Court **FINDS** and **CONCLUDES** this subsection exempts Defendant from any trespass allegations and **GRANTS** summary judgment o ı; the state law claim.

Accordingly, since the Court of Appeal found that there is a violation of the right, the logical effect would be to resuscitate the

state law claim for trespass. At a minimum summary judgment on the state law claim would not be appropriate. The matter should be remanded for either district court consideration or transfer to the state court.

A review of the opinion reveals several instances where the Court draws the factual inferences to the favor of the police officer defendant, even though they properly quote the legal standard to be that the non-moving party is entitled to the benefit of factual inferences when resisting a motion for summary judgment. (See Opinion, page 2)

However, at pages 10-12 of their opinion, the Court repeatedly rejects the version of facts put forward by Plaintiff Edens. For example, there is serious doubt as to whether Trooper Kennedy ever discovered the flowerpot at Edens' property on the first visit prior to obtaining a search warrant.

Initially, it must be noted that Edens never planned or knew of any pot of marijuana at his residence. He has no drug record of any type and had been engaged in a bitter dispute with a county investigator who was his neighbor. No one has presented the alleged plastic pot. The photograph of a plastic pot was taken on a roadway, not in any proximity to his home. App. p. 528a. There is evidence, by a qualified and experienced expert, that a state magistrate did not sign the purported search warrant although not accepted by the Court on technical grounds. The magistrate is a former secretary to the prosecuting investigator with whom he had the neighbor dispute. (App. p. 859a)

The trooper in his deposition testified as follows:

Q Now, is there any system for logging these incoming calls?

A The dispatcher would make note. I would mark out and they would make note of what time I marked out and marked back in.

Q Now, you're talking about --

A Radio dispatcher.

Q -- the radio dispatcher, saying, "Well, I'm heading out now"?

A Actually, what would happen is when I were to mark out -- and this is not a procedure, it's something that we commonly do. If I were to go out at a residence, I would say -- I would call my unit number to our dispatcher and I'd say, "I'll be out at such-and-such residence," or, "I'll be out Utah Road," and then they would make note of it on their radio log. It's not something as when we leave the office, it's actually when we arrive at the scene.

Q So is that a record that would be maintained for a while?

A I would assume. That's something that's strictly -- I don't know what they do with those records. It's strictly administrative.

Q But that record would indicate pretty clearly the time that you arrived then that they noted that you reported that you arrived?

A Yes. Yes, it would.

Q And that record would be called a dispatch record?

A Radio log.

Q Radio log?

A Radio log.

Q And have you had an opportunity to review any radio logs involving this case?

A No.

Q Tell me a little bit about the radio log. You would call in when you arrived at the residence and report that. When would be the next time, if any, you would --

A If I were to have marked out, as we call it, of the car -- this is something that we-- it's not a policy that we do this and when you work a lot by yourself as a police officer, you become accustomed to just depending on yourself. I would assume that on this specific day I would have marked out and if I would have marked back in, that would be basically when I would get back in the car. Within a few minutes, I'm going to get on the radio and say I'm back in the car.

Q It's a way of letting somebody keep tabs on you?

A Yes. (App. pp. 367a-369a)
(Emphasis added)

Here, the trooper specifically testified that he assumed he followed the procedure on this specific day. The logs confirm his other activities for the day. But, this crucial entry regarding this disputed initial trip is missing.

The creation of this genuine issue of material fact grows out of the totality of circumstances, corroborated by the state police's

own official log. In view of the legal standards in a summary judgment matter, it cannot fairly be said that the district court gave the plaintiff the benefit of all reasonable inferences.

In response to the above argument, the Court made the following finding at page 12 of their opinion: "But neither the log itself nor Kennedy's deposition testimony about his procedures establishes that Kennedy reports all his movements to the dispatcher. Accordingly, we conclude that the evidence relied upon by Edens does not conflict with Kennedy's claim that he visited Edens' property before seeking a search warrant."

Here, the Court merely accepts the factual interpretation put forward by the defense. This factual approach destroys any hope of overcoming immunity defenses.

An example of this approach utilized in another unpublished opinion from the same panel is Julie Martin v. Doug Dishong, CA-00-3148-2-23, decided July 9, 2004. In that case the Court of Appeals reversed the findings of the district court which had found sufficient facts to create a genuine issue of material fact on the question of qualified immunity. In that case, the officer shot and killed the citizen who had been suspected of illegal trash dumping (littering). The shooting occurred at a roadblock after the suspect fled in his truck. While the Court agreed there was a genuine issue granted fact as to whether the defendant posed a threat to the officer, based on differing interpretations of the events, there was no such issue as to whether the citizen posed a threat to others. The Court held this officer was justified in shooting the citizen, as a matter of law, on the assumption that he would continue at high speed if he got away from the roadblock, and hence granted qualified immunity. Even though the truck had slowed to "walking speed" and the chase was a "controlled pursuit" through the country club grounds, the Court held that the inference that the citizen no longer intended to flee was not "plausible".

The handwriting expert's report, together with his extensive background and credentials, were properly submitted with plaintiff's reply to summary judgment. (See item 5 at App. p. 941a). (Actual report at App. p. 907a, et seq.). It should be noted that his experience as a questioned document examiner includes work for the California Department of Justice, the U.S. Treasury Department and the Sacramento County Sheriff. (App. pp. 899a-901a). He has been qualified in court on numerous occasions as listed at App. pp. 902a-906a).

However, the report was not put in affidavit format. Counsel's home jurisdiction accepts expert reports without an affidavit. Nonetheless, when made aware of the objection, arrangements were made for a sworn deposition, whereby the expert traveled from California to Charleston, West Virginia. He confirmed his report findings and conclusion under oath. The deposition was taken on July 22, 2003, for submission to the Court, but was not transcribed prior to the Court's ruling on the summary judgment. Accordingly, it was attached to the plaintiff's request for reconsideration within ten (10) days of the judgment. At all times the defense was aware of the procedure. At no time was the defense prejudiced. Counsel had understood the Court's procedure was to review summary judgment issues at an upcoming scheduled status conference. But the conference was cancelled.

The unequivocal conclusion of this highly qualified expert, under any legal standard, creates a genuine issue of material fact. This experienced expert strongly believes the search warrant signature is a forgery. (App. p. 897a)

Appellant's good faith effort to comply, coupled with the absence of prejudice and the interest of justice make it clear that the report and deposition should be considered. The information in the report was submitted timely. The later deposition which was not

available at the time of the initial submission involving a California witness confirmed the report and served to correct the requirement that the report be sworn in affidavit format.

It is noted that no counter-expert testimony of any kind has been offered.

Further, an expert's report simply contains the opinion of its author. There are no objective facts to be subjected to special verification. The professional attaches his reputation to his report with his signature. It is hard to understand what special purpose exists behind a sworn affidavit form where the information contained within the report is merely subjective opinion.

Under these circumstances the Court of Appeals elevated form over substance. The pursuit of justice is not served fairly by the ruling discounting the expert's report.

Public policy in enforcing clearly established constitutional rights is strongly supported by this Court's review. The Appeals Court's opinion is a strong statement in support of the protection of the curtilage areas surrounding the property of private citizens. However in its current state, it remains an unpublished opinion. Appellant Edens is concerned that the policy of not publishing an Opinion which otherwise recognizes the existence of a constitutional right, but nonetheless grants qualified immunity on the basis that the right has not previously appeared in a published opinion, will only serve to perpetuate unfairly the immunity. Even though the right is established in this panel opinion, since it is unpublished, the next officer to violate this right would also be able to make a claim of qualified immunity. Accordingly it is respectfully requested at a minimum that this decision be directed to be published so as to establish a basis to halt Fourth Amendment abuses associated with the private curtilage areas enclosed by fences and marked with signage. Of course when the effect of the

previously quoted West Virginia statute is considered it is here suggested that the case outcome should also change.

The Fourth Circuit's approach to qualified immunity cases too greatly favors the law enforcement community. It is likely that only the intervention of the Court will establish the proper balance.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,

Peter M. Suwak, Esquire
PA I.D. #23779
Pete's Surplus Building
PO Box 1
Washington PA 15301
Phone: (724) 228-4885
Counsel for Petitioner

APPENDIX

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

November 24, 2005

William K. Suter
Clerk of the Court
(202) 479-3011

Mr. Peter M. Suwak
Pete's Surplus Building
P.O. Box 1
Washington, PA 15301

Re: Romie R. Edens, Jr.
v. George L. Kennedy
Application No. 04A439

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on November 24,2005 extended the time to and including December 29, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Sutter, Clerk
By
Melissa Blalock
Case Analyst

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 31, 2004

No. 03-2108
CA-01-933-2

ROMIE R. EDENS, JR.

Plaintiff - Appellant

v.

GEORGE L. KENNEDY, individually and/or in his capacity as a Senior Trooper for the West Virginia State Police

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkins, Judge Motz, and Judge Beam.

For the Court,
/s/ Patricia S. Connor

CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROMIE R. EDENS, JR.,
Plaintiff-Appellant,

v.

GEORGE L. KENNEDY, individually and/or in his capacity as a Senior Trooper for the West Virginia State Police,

No. 03-2108

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Charles H. Haden II, District Judge.
(CA-01-933-2)

Argued: May 4, 2004

Decided: August 4, 2004

Before WILKINS, Chief Judge, MOTZ, Circuit Judge, and C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Peter Michael Suwak, Washington, Pennsylvania, for Appellant. Michael Deering Mullins, STEPTOE & JOHNSON, Charleston, West Virginia, for Appellee, **ON BRIEF:** Ancil G. Ramey, Jeffrey K. Phillips, STEPTOE & JOHNSON, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This appeal arises from a suit filed by Appellant Romie R. Edens, Jr. pursuant to 42 U.S.C.A. § 1983 (West 2003). Edens alleges that Appellee George L. Kennedy, a West Virginia State Trooper, twice violated Edens' Fourth Amendment rights by trespassing on his property, once with no warrant and once with an invalid warrant. Edens further alleges that Kennedy chilled Eden's exercise of First Amendment rights by filing a report accusing him of illegal activities after he told a reporter about Kennedy's alleged misconduct.

The district court granted summary judgment to Kennedy on all claims. We Affirm.

I. *Introduction*

The facts of this case are intensely disputed. In general, Edens alleges that Kennedy violated his constitutional rights as a result of Kennedy's association with Carney Wright, a neighbor of Edens' who works for the local prosecutor; Wright has had a long-running dispute with Edens stemming from an attack by Wright's dog against Edens' wife's dog. Kennedy replies that he does not know Wright and that his actions were normal police practices that did not infringe Edens' rights. More detailed descriptions of the evidence will accompany the discussion of each of Edens' claims.

On appeal from the grant of summary judgment, we view the evidence in the light most favorable to Edens' the nonmoving party. *See Figgie Int'l, Inc. v. Destileria Serralles, Inc.*, 190 F.3d 252, 255 (4th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Our review is de novo. *See Edelman v. Lynchburg College*, 300 F.3d 400, 404 (4th Cir. 2002).

Also relevant in this appeal is the doctrine of qualified immunity, which shields government officials from liability for conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Wilson v. Layne, 526 U.S. 603, 609 (1999) (internal quotation marks omitted). "A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Id. (internal quotation marks omitted).

II. *Kennedy's Fist Entry onto Edens' Property*

On October 6, 1999, Kennedy obtained a search warrant for Edens' home. In his warrant application, Kennedy alleged that he had seized marijuana plants from Edens' front doorstep earlier that day. Edens alleges that the entry onto his property described in the warrant application was unconstitutional. We hold that this entry may have been unlawful but that Kennedy is entitled to qualified immunity. Accordingly, we affirm the entry of summary judgment against Edens on this claim.

A. *Facts*

Edens' house is located on a narrow, rural road. There is a fence around the front, back and left side of the house (as one faces the front of the house); on the right side of the house, there is no fence, but the lot is densely wooded. The fence does not obscure the view of the home from the road, both because its rails are separated by wide gaps (as are the fenceposts) and because the house is located on a hill.

Where the fence crosses the driveway, to the left of the house, there is a gate wide enough to admit a vehicle. The gate is kept locked, and the fencepost next to the gate is marked with a sign that Edens characterized as a "No Trespassing" sign. J.A. 160a. Edens also testified that several other "No Trespassing" signs are displayed on his property. Edens acknowledged, however, that his signs frequently fall down. Kennedy testified that when he went to Edens' house he saw that the gate was locked but did not notice any "No Trespassing" signs.

The fence in front of the house is not quite flush with the woods to the right of the house. Instead, there is a gap

approximately four feet wide between the fence and woods; this gap is near the road that runs in front of Edens' home. Edens attempts to cover this gap with a wooden pallet in order to prevent the escape of cattle he keeps on his property, but the pallet often falls over. According to his deposition testimony, Kennedy entered the property through the gap between the fence and the woods. He could not recall seeing the pallet at the time.

Kennedy testified that he went to Edens' house in response to an anonymous tip. According to Kennedy, the tipster said that

> he worked for the power company and that he had installed a meter base or meter box . . . at a place the day prior and that he'd seen marijuana plants . . . outside the residence or in portable pots, something of that nature.
>
> . . . .
>
> He then went into detail that . . . several marijuana plants . . . were in portable containers outside the residence. And then he went on to say that he actually knew the homeowner and that the homeowner was growing them indoors and was carrying them outside during the day for sunlight . . . .

Id. At 345a-46a. The tipster also provided Kennedy with Edens' address and description of his house.

Kennedy recounted at his deposition that he and another officer, Donald Fry, responded to this tip by going to the address provided by the tipster. After confirming that the property matched the tipster's description, Kennedy parked his vehicle by the side of the road. While Frye waited in the vehicle, Kennedy walked through the gap between the fence and the woods and went to the front door of the house to

"talk to the homeowner." *Id.* At 370a. Acknowledging that he did not have probable cause at that time, Kennedy said his intent was to ask the homeowner for consent to search the home.

When Kennedy got to the front door, he saw a flowerpot containing five or six marijuana plants. After finding this flowerpot, he knocked on the front door but got no response. He then went to the back and knocked on the door there, but he again received no response. While in back of the house, Kennedy did not see the marijuana plants that had been described by the tipster. He did, however, observe that the windows of the home were covered with plywood, which he was aware was a common practice among marijuana growers. According to his testimony, Kennedy left the premises after receiving no answer to his knocks, taking the flowerpot and its contents with him.[1]

B. *Analysis*

Edens claims that the entry onto his property was unlawful because (1) Kennedy should have investigated the tip more thoroughly before intruding on Edens' property; (2) Kennedy's entry to "talk to the homeowner" was really a pretext for searching the curtilage around Edens' home; and

---

[1] Kennedy testified that he brought the flowerpot back to his office, submitted its contents for testing, and discarded the pot itself. One lingering question about this pot concerns its color; Kennedy described it as "lime green" in his search warrant affidavit, *id.* at 861a; then said in a subsequent report that it was "blue in color," *id.* at 948a; and then testified in his deposition that "the color of the flower pot was actually a bluish-green, lime green. It was turquoise, I don't know," *id.* at 370a-71a. Edens mentions these matters in his brief but apparently does not rely on them to support any of his appellate claims.

(3) even if Kennedy genuinely intended to knock and ask permission to search the interior of the home, rather than to search the exterior without consent, the entry onto Edens' property was impermissible in light of Edens' clear intent to exclude strangers from his premises. We hold that the district court properly granted summary judgment on these claims.

Before addressing Edens' individual arguments, we note that Edens has questioned whether the initial entry onto his property even occurred. His allegations, if true, would lend considerable support to the Fourth Amendment claim discussed in Part III but would obliterate this claim. We will therefore assume for purposes of this claim that Kennedy in fact went to Edens' house and walked on Edens' property before obtaining a search warrant. We will discuss Edens' allegations to the contrary in Part III.

1.

Edens urges that Kennedy could have evaluated the veracity of the anonymous tip without encroaching on Edens' property - for example, by checking whether the power company had in fact serviced Edens' home or by conducting a helicopter flyover of the property (which was done by Frye after he and Kennedy visited Edens' property). The Fourth Amendment, however, does not require police officers to employ the "least intrusive means" of conducting their investigations. *Bd. Of Educ. v. Earls*, 536 U.S. 822, 837 (2002). Thus, if it was otherwise lawful for Kennedy to enter Edens' premises, the fact that he could have followed up on the tip in some other manner does not render the entry unconstitutional.

2.

Edens' second argument derives from the limitations on

so-called "knock and talk" investigations. We have held that, ordinarily, no Fourth Amendment violation occurs when the police "knock on a residence's door or otherwise approach the residence seeking to speak to the in habitants." *Rogers v. Pendleton,* 249 F.3d 279, 289 (4th Cir. 2001); *see Alvarez v. Montgomery County,* 147 F.3d 354, 357 (4th Cir. 1998) ("[P]olice may approach a building, including the front entranceway to a residential dwelling, without committing a search where a person lacks a reasonable expectation of privacy in the area."). Furthermore, the police may circle to the back of the home under appropriate circumstances. *See Alvarez,* 147 F.3d at 358. The police may not, however, conduct a full search of the curtilage without a warrant or another justification that would be sufficient for entry into the home itself. *See Rogers,* 249 F.3d at 287, 289.

Edens contends that Kennedy's entry onto his property was unlawful because the purpose was to search the curtilage. But Kennedy's purpose is irrelevant. Edens has offered no evidence that Kennedy conducted a general search of the curtilage or otherwise strayed from the areas a police officer is ordinarily permitted to enter. To the extent that Kennedy would ordinarily have been permitted to enter the curtilage and knock on the front and back doors of Edens' home, his authority to do so was not impaired by his receipt of a tip stating that there might be evidence of criminal activity behind Edens' house. *See United States v. Villamonte-Marquez,* 462 U.S. 579, 584 n.3 (1983).

3.

Edens' final argument with respect to this claim is that his clear declaration of his intent to exclude strangers from his property rendered any "knock and talk" unlawful, regardless of Kennedy's motivation. We hold that Kennedy's entry onto

Edens' property may have violated the Fourth Amendment but that Kennedy was nevertheless entitled to summary judgment on qualified immunity grounds.

Our analysis begins with the precept that the curtilage is entitled to the same Fourth Amendment protection as the home. *See Oliver v. United States,* 466 U.S. 170, 180 (1984); *Rogers,* 249 F.3d at 287. This does not mean, however, that limits on access to the home and the curtilage are equivalent. Access to the home is strictly forbidden in the absence of a warrant or exigent circumstances. *See Payton v. New York,* 455 U.S. 573, 590 (1980). In contrast, police officers ordinarily may enter the curtilage in order to approach the home without implicating the constraints of the Fourth Amendment. *See Alvarez,* 147 F.3d at 357.

We hold, however, that if the owner of a home encloses the curtilage with a fence, locks the gate, and posts "No Trespassing" signs, the effect for Fourth Amendment purposes is to extend the walls of the home to the edge of the curtilage. This is because the act of sealing the property creates an elevated expectation of privacy. *Cf. California v. Ciraolo,* 476 U.S. 207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (quoting *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J., concurring))); *Alvarez,* 147 F.3d at 357 (discussing reasonable expectations of privacy with respect to curtilage).

In the absence of a fence with a locked gate, a homeowner is likely to receive visits from pollsters, door-to-door salespeople, and trick-or-treaters, among others. There is no constitutional basis for excluding police officers from this list of potential visitors. *See Rogers,* 249 F.3d at 289-90 ("[P]olice officers do not need a warrant to do what any private citizen may legitimately do - approach a home to

speak to the inhabitants."). Nevertheless, the homeowner can reasonably expect all such visits to cease when he has manifested his intent to exclude strangers by sealing the property around his home and posting "No Trespassing" signs. Thus, in the absence of a warrant or exigent circumstances, a police officer may not lawfully breach a locked enclosure around the curtilage. *See State v. Brocuglio,* 779 A.2d 793, 800 (Conn. App. Ct. 2001) (holding that police violated Fourth Amendment by entering backyard enclosed by stockade fence posted with "No Trespassing" and "Keep Out" signs), *aff'd,* 826 A.2d 145 (Conn. 2003); *State v. Ridgway,* 790 P.2d 1263, 1265 (Wash. Ct. App. 1990) (holding that marijuana recovered from doorstep was subject to suppression because police observed marijuana only after walking around closed gate across driveway and evading guard dogs while approaching house).

We emphasize that our holding is a narrow one. In particular, we do not hold that all enclosed areas are off limits to the police. An enclosed area outside the curtilage may be subject to warrantless intrusions even if the owner has posted "No Trespassing" signs. *See Oliver* 466 U.S. at 176-84 (holding that the Fourth Amendment did not apply to searches conducted in enclosed areas remote from the defendants' homes). And, even within the curtilage, the police may transverse a fence if there is no clear indication that the homeowner intended to exclude uninvited visitors. For example, in *Rogers,* we upheld an entry into the curtilage for the purpose of conducting a "knock and talk" even though the property in question was surrounded by a fence and a privacy hedge. *See Rogers,* 249 F.3d at 293, 294. But if a fence within or around the curtilage is locked and posted with signs in order to prevent access, this "manifest[s] an objective intent that the area be preserved as private." *Brocuglio,* 779 A.2d at 800. When such intent would be apparent to a

reasonable officer, the police may not enter the enclosed area without a warrant or exigent circumstances.

It may be that no such intent was apparent here, despite the locked gate and the "No Trespassing" signs, because the gap between Edens' fence and the woods next to his house permitted relatively easy access to his front yard. We need not resolve that question, however, because Kennedy is entitled to qualified immunity even if Edens' intent to exclude uninvited visitors was plain.

We have found only one case decided before October 6, 1999 (the date of the intrusion at issue here) that squarely supports Edens' claim. *See generally State v. Ridgway*, 790 P.2d 1263 (Wash. Ct. App. 1990). *Ridgway* was decided by an intermediate court in Washington State, and it therefore did not create clearly established law of which a reasonable officer in West Virginia should have been aware. *See Wilson v. Kittoe*, 337 F.3d 392, 402-03 (4th Cir. 2003) ("In determining whether a right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." (alteration and internal quotations marks omitted)). Moreover, *Ridgway* stands in contrast to numerous cases upholding the entry of police officers into areas enclosed by fences or marked with "No Trespassing" signs. *See* Vanessa Rownaghi, Comment, *Driving into Unreasonableness The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U.J. Gender Soc. Pol'y & L. 1165, 1183-85 (2003) (discussing cases). Although those cases are factually distinguishable, and thus do not preclude us from reaching the holding we have announced today, they do not support Edens' claim either. Accordingly, although Kennedy's entry on Edens' property may have violated the Fourth Amendment, Kennedy is

entitled to qualified immunity. We therefore uphold the entry of summary judgment on Edens' claim arising from the first intrusion onto his property.

III. *Kennedy's Second Entry onto Edens' Property*

On October 6, 1999, Kennedy went to Edens' home with a search warrant and searched the premises, including the interior of the house. He did not find any evidence of marijuana use or cultivation. Edens claims that this search was unlawful.

"When an officer acts pursuant to a warrant, the pertinent question is whether the officer could have reasonably thought there was probable cause to seek the warrant." *Smith v. Reddy,* 101 F.3d 351, 356 (4th Cir. 1996). Edens contends that such a belief was unreasonable here because (a) Kennedy never actually went to Edens' home before requesting a search warrant, so the averments in his warrant application - which depended heavily on his observations during the first entry - were all false; and (b) the tip that induced Kennedy to make the search was verifiably false. Edens further contends that, even if probable cause existed, the warrant here was invalid because the magistrate's signature was forged. We affirm the entry of summary judgment as to each of these issues.

A. *Alleged Misrepresentations about Previous Observations*

In his application for a search warrant, Kennedy relied on observations purportedly made at Edens' home earlier that day (during the entry discussed above in Part II). Edens alleges that Kennedy's description of the first entry is not credible for four different reasons. We find these

considerations insufficient to create a material question of fact about whether the first entry occurred.

First, Edens claims that Kennedy's deposition testimony that Trooper Frye accompanied him during the first entry is contradicted by a police report drafted by Kennedy in which he consistently referred to "this officer" in the singular. *E.g.*, J.A. 947a ("After obtaining the information from the anonymous caller, this officer then traveled to . . . the suspect's residence . . . ."). We question whether the use of "this officer" proves that only one officer was present, particularly in light of the limited role attributed to Frye in Kennedy's deposition (as well as Frye's). In any event, this alleged discrepancy in no way suggests that Kennedy did not visit Edens' home at all before obtaining a search warrant; it merely raises the question of whether Kennedy traveled alone or with another officer.

Second, Edens asserts that photographs allegedly taken by Kennedy during his first visit to Edens' home were shot in the afternoon. This is significant because it is undisputed that the search pursuant to the warrant occurred around 1:30p.m.; thus if Kennedy's first entry onto Edens' property occurred at all, it must have occurred in the morning or very early afternoon, in light of the tasks that Kennedy had to complete in order to obtain a search warrant. An expert hired by Edens, Ralph Bouwmeester, concluded that shadows in Kennedy's photographs prove that the photos could not have been taken at any time on October 6, 1999, and instead must have been taken around 2 p.m. on October 17, 1999, or February 24, 2000 (or perhaps on those same dates during other years). Bouwmeester's report was not admissible on summary judgment, however, as it was unsworn and was not

accompanied by an affidavit affirming its authenticity.[2] *See Scott v. Edinburg*, 346 F.3d 752, 759 (7th Cir. 2003); *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 1000 (5th Cir. 2001).

Third, Edens notes that the flowerpot allegedly seized during the first entry was listed on the property receipt that Kennedy prepared later when he executed the warrant. Kennedy testified at his deposition that he put the flowerpot on the warrant receipt, rather than on a separate property receipt, because the seizure occurred the same day as the search and "[t]he time was irrelevant." J.A. 486a. On summary judgment, however, we are constrained to disregard this testimony and draw the inference proposed by Edens - namely, that Kennedy did not seize the flowerpot until he executed the warrant. This may show that he *never saw* the pot until that moment, as Edens contends, but it is equally plausible that Kennedy *saw* the pot during the first entry but did not *seize* it until his return to the premises a few hours later. There is no evidence in the record that would allow a jury to choose the former inference over the latter without engaging in speculation. We therefore conclude that the inclusion of the flowerpot on the property receipt does not give rise to a material dispute of fact about whether the first entry occurred.

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[2] Kennedy asserts that even if the Bouwmeester report was properly admitted on summary judgment, this court may not consider it because it does not appear in the joint appendix. We are permitted, however, to rely on material in the record that is not included in the appendix. *See* Fed. R. App. P. 30(a)(2). We also direct counsel's attention to Fourth Circuit Rule 30(c), which states, "Notwithstanding that FRAP 30 provides that the appellant shall prepare and file the appendix, the Court considers the coordination of preparing the appendix to be the responsibility of both sides. The failure of a side to designate does not absolve the other side from the responsibility."

Fourth, Edens contends that a log of radio communications between Kennedy and the dispatcher lists only one visit to Edens' home, around the time of the execution of the search warrant. Edens asserts that the absence of any reference to an earlier visit proves that the first entry never occurred. But neither the log itself nor Kennedy's deposition testimony about his procedures establishes that Kennedy reports all of his movements to the dispatcher. Accordingly, we conclude that the evidence relied upon by Edens does not conflict with Kennedy's claim that he visited Edens' property before seeking a search warrant.

B. *Alleged Falsehoods in the Anonymous Tip*

Edens further asserts that even if the first entry occurred, there was no probable cause for a search because the information provided by the anonymous tip had been or could have been proven false. We disagree.

Edens initially maintains that the tipster's description of 50 marijuana plants behind the house was disproven when Kennedy went to the house and knocked on the back door, and again when Frye conducted the helicopter flyover. We agree that the failure to discover marijuana plants behind Edens' house undermined the tipster's reliability to some extent, as the tipster told Kennedy that "the homeowner was growing them indoors and was carrying them outside during the day for sunlight." J.A. 346a. But Kennedy was not required to infer from this tip that the homeowner took his plants outside *every day.* Consequently, the fact that there were no marijuana plants behind the house did not prove that the information from the tipster was false.

Edens also asserts that his meter box was installed in 1998, not on October 5, 1999 (the date indicated by the

tipster). Even if this is true, however, there is no evidence in the record that the power company would have been willing to disclose this information to the police. Accordingly, Edens has not established that Kennedy could have investigated the veracity of the anonymous tip without searching the premises.

In any event, the warrant was supported by probable cause even if information available to Kennedy had substantially undermined the reliability of the tip. During the first entry, Kennedy personally observed marijuana plants on the doorstep and boards over the windows - and, as we have discussed, nothing in the record discredits his claim that those observations were made. These observations were sufficient in themselves to support the issuance of a warrant. *See United States v. Malin*, 908 F.2d 163, 165-66 (7th Cir. 1990) (holding that observation of marijuana plants in backyard sufficed to establish probable cause for search of home), *abrogation on other grounds recognized in United States v. Monroe*, 73 F.3d 129 (7th Cir. 1995); *People v. Pannebaker*, 174 P.2d 904, 907-08 (Colo. 1986) (en banc) (nothing that coverings on windows provided evidence of marijuana cultivation). Thus, by the time Kennedy sought a warrant, the reliability of the tip was moot.

C. *Alleged Forgery of the Magistrate's Signature*

1.

The affidavit that Kennedy prepared to support his search warrant application bears the signature of Magistrate Traci L. Carper, affirming that the affidavit was "subscribed and sworn" in her presence. J.A. 860a. The search warrant issued upon that affidavit also bears Magistrate Carper's signature. Edens commissioned a forensic documents examiner, James Blanco, to determine whether these

signatures ("the questioned signatures") were authentic. After comparing the questioned signatures to signatures on other court documents ostensibly signed by Magistrate Carper ("the known signatures"), Blanco determined that the questioned signatures were forged.

Edens submitted Blanco's report to the district court along with other exhibits appended to Edens' answer to Kennedy's summary judgment motion. The district court refused to consider this report, however. The court reasoned that Blanco's conclusion was premised on "an error of logic" in light of Magistrate Carper's testimony at her deposition that she had signed the affidavit and the search warrant. *Id.* at 981a. The court further noted that Blanco's report was not accompanied by an affidavit or otherwise substantiated by sworn declarations.[3]

We cannot accept the first rational employed by the district court. At her deposition, Magistrate Carper testified that both of the questioned signatures and seven of the eight known signatures were hers. (The eighth signature exemplar was not shown to her.) The district court apparently believed it was illogical for Blanco to accept Magistrate Carper's confirmation of the known signatures while disregarding her testimony concerning the questioned signatures. The jury, however, would be permitted to make such a determination and we must give effect to this possibility on summary

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[3] The district court did not question, nor do we, that the search of Edens' home was unlawful if the magistrate's signature on the warrant was in fact forged. This is so regardless of whether the warrant application established probable cause for the search. *Cf. Groh v. Ramirez*, 124 S Ct. 1284, 1289-90 (2004) (holding that search based on invalid warrant is unlawful even if warrant application establishes probable cause and adequately particularizes places to be searched).

judgment.[4]

Nevertheless, the grant of summary judgment was proper in light of the second ground noted by the district court. As discussed above, unsworn reports are inadmissible on summary judgment unless accompanied by affidavits or depositions swearing to their contents and conclusions. Thus, the district court properly refused to consider the Blanco report.

2.

After the entry of summary judgment, Edens moved for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). Appended to this motion was a transcript of Blanco's deposition, in which he affirmed his authorship of the report and attested to its contents. Edens asserted that this new document cured any technical defect in the admissibility of Blanco's report. The district court denied Edens' motion.

"There are three circumstances in which the district court can grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir 2002) (internal quotation marks omitted), *cert. denied*, 538 U.S. 1012 (2003). We review a decision denying reconsideration for abuse of discretion. *See id.*

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[4] Kennedy notes that Blanco admitted that it was possible the questioned signatures were Magistrate Carper's. Blanco also acknowledged certain similarities between the questioned signatures and the known signatures and conceded that litigants can procure experts for any conclusion they desire. To the extent these statements raised questions about Blanco's credibility, the district court was obligated to resolve those questions in favor of Edens.

We find no abuse of discretion here. Of particular significance is Edens' failure to account for the fact that Blanco's report was not timely authenticated. In this regard, a timeline of events is relevant. Kennedy noticed Blanco's deposition on July 8, 2003, with the deposition scheduled for July 22. Edens' counsel has indicated that the parties agreed on this date beforehand. *See* Br. Of Appellant at 29. The deposition took place on the designated date, and the transcript was completed on August 4. Meanwhile, Edens filed his memorandum opposing summary judgment on July 7 (one day before the Blanco deposition was noticed), and the court issued its order granting summary judgment on August 6 (two days after the transcript was completed).

If Edens knew of the impending deposition when he prepared this response, he could have filed an affidavit stating that he was temporarily unable to "present . . . facts essential to justify [his] opposition," Fed. R. Civ. P. 56(f). He certainly could have presented such an affidavit after Blanco's deposition was noticed, and he may even have been able to present the transcript of Blanco's deposition to the court prior to the entry of summary judgment. Indeed, Edens could have avoided all of this trouble by simply directing Blanco to provide an appropriate affidavit along with his report, or by obtaining such an appropriate affidavit along with his report, or by obtaining such an affidavit later. In light of Edens' failure to perform any of these actions, it was within the discretion of the district court to deny Edens Rule 59(e) motion. *See Looper Maint. Serv. Inc. v. City of Indianapolis,* 197 F.3d 908, 915 (7th Cir. 1999) (noting that movant's diligence is relevant factor in ruling on Rule 59(e) motion); *cf. Santiago v. Wood,* 904 F.2d 673, 676 (11th Cir. 1990) (per curiam) (holding that denial of motion to reconsider was abuse of discretion, based in part on movant's evident diligence in filing motion).

IV. *Kennedy's Response to the Newspaper Report*

Edens' final claim is that Kennedy violated Edens' First Amendment rights by filing an investigative report in response to a newspaper article describing Kennedy's search of Edens' property. We affirm the entry of summary judgment in Kennedy's favor.

On January 24, 2000, the *Charleston Gazette* published an article describing Edens' conflict with Carney Wright and his complaints against Kennedy. The text suggests that Edens was the prime source for this article, and perhaps the instigator of its publication.

On the day of the article was published, Kennedy forwarded to the prosecutor's office a report detailing the investigation he conducted after receiving the anonymous tip. The report described Kennedy's discovery of marijuana plants on Edens' doorstep but added that no evidence of criminal activity was found in Edens' house or its out-buildings. The report also noted that Kennedy chose not to arrest Edens because of his "cooperative attitude, no prior drug history, and his personal request to submit to a polygraph examination compounded with the fact that no evidence was obtained from within the residence that could possibly link the marijuana in the portable container to being grown within the home." J.A. 950a.

Kennedy testified at his deposition that he was required to file an investigative report and send it to the prosecutor notwithstanding his conclusion that no arrest was warranted. He did not file this report promptly because he was "backlogged" with other work and because in light of his determination not to make an arrest, "[i]t was a closed case to [him]." *Id.* at 409a. Kennedy further testified that he wrote the report in response to a telephone call from a *Gazette*

report and a subsequent instruction from his supervisor that "you'd better go ahead and do a report and get it in writing because it sounds like something is going to come of it." *Id.* at 473a (internal quotation marks omitted).

Edens has not been charged with any offense, nor is there any evidence that the grand jury has opened an investigation concerning Edens. Edens testified, however, that the report will "hang [] over my head for seven years." *Id.* at 310a. Edens alleges that Kennedy filed this report to help Wright "communicate to Edens that [Wright] had sufficient influence in the law enforcement community that Edens could be subjected to harassing prosecutions while Wright could not be touched." Br. Of Appellant at 31.

In order to prove a First Amendment retaliation claim, a § 1983 plaintiff must prove three elements:

> First, the plaintiff must demonstrate that his or her speech was protected. Second, the plaintiff must demonstrate that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech. Third, the plaintiff must demonstrate that a causal relationship exists between its speech and the defendant's retaliatory action.

Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000) (citations omitted). Edens' claim fails because there is insufficient evidence in the record to establish the second of these elements. The mere occurrence of retaliatory action is not sufficient to prove this element; instead, the action must have some "adverse impact" on the plaintiff. *Id.* at 685. The only impact demonstrated here is Edens' fear that Kennedy's report might someday result in a prosecution, despite its inclusion of significant exculpatory evidence. Fear

of this nature is not sufficient to support a First Amendment retaliation claim. *See Wade v. Goodwin,* 843 F.2d 1150, 1152 (8th Cir. 1988) (rejecting retaliation claim predicated on "speculative apprehensiveness as to future misuse of information"). We therefore affirm the entry of summary judgment on this claim.

V. *Conclusion*

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

ROMIE R. EDENS, JR.,

Plaintiff,

v. CIVIL ACTION NO. 2:01-933

GEORGE L. KENNEDY,

Defendant.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered this day, the Court **GRANTS** judgment in favor of Defendant and **ORDERS** the case be **DISMISSED** with prejudice and **STRICKEN** from the docket.

The Clerk is directed to send a copy of this Judgment Order to counsel of record by facsimile transmission and first class mail.

ENTER: August 6, 2003

_____

Charles H. Haden II
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

ROMIE R. EDENS, JR.,

Plaintiff,

v. CIVIL ACTION NO. 2:01-933

GEORGE L. KENNEDY,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending is Defendant's motion for summary judgment on Plaintiff's § 1983 and state law claims, which the Court **GRANTS.**

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts are recounted "in the light most favorable to the party asserting the injury," in this case Plaintiff Edens. See Saucier v. Katz, 533 U.S. 194, 201 (2001). On October 6, 1999, West Virginia State Police Trooper George L. Kennedy received a telephone call from an anonymous informant advising that Edens was cultivating marijuana. The tipster explained he worked for the power company and had installed a meter box at Eden's residence the day before. He said he had seen marijuana plants outside the home, maybe 50 plants growing in plastic containers. The informant gave an address and description of the residence. He said he knew

the homeowner, that he was growing plants indoors and carrying them outside during the day for sunlight. He claimed to know what marijuana looked like.

On this basis, a police helicopter surveilled the property but no marijuana was seen. Kennedy and another trooper then drove to the home to talk to the homeowner. Eden's residence is located in a rural area on a paved road. The lawn along the road is fronted by a post and rail fence, painted white. The fence is made of white wood posts with three white boards at intervals acting as rails between the posts. The house is clearly visible from the road, both because it sits on a rise and because the construction of the fence is open and allows views of the house and lawn. The driveway has a metal gate, which was closed and according to Trooper Kennedy's Report of Criminal Investigation, "This officer noted that the driveway to the suspect's residence was locked therefore this officer walked through the yard area and approached the front of the home." (Pl.'s Reply, Ex. 8 at 3.) Edens claims he had two "No Trespassing" signs, one on the fence at the driveway and another on a tree, but Kennedy maintains he never saw either sign.

The white fence only extended across the front of the property. Kennedy testified he drove past the property, identified it as the subject of the tip, turned around in a driveway, returned to the end of the white fence and entered through a gap or walkway behind the fence onto the lawn, and walked to the front door. As he walked there, Kennedy could see plants in a pot on the concrete entry slab by the door and when he was close enough he saw there were six marijuana plants in a plastic pot. He knocked on the front door, but no one responded, then walked to the rear, but raised no one in the house.

Trooper Kennedy then seized the marijuana plants and took them to the Kanawha County Magistrate Court where he

applied for a search warrant for Eden's home. Kennedy's affidavit based the request on the tip, the marijuana plants, and the fact the windows in the home were boarded up, as if to conceal something.[1] After reviewing Kennedy's affidavit, Magistrate Traci Carper found probable cause existed for a search of Eden's Home. The search warrant was executed by Trooper Kennedy accompanied by several other troopers, who searched the house and outbuildings, but found no further evidence of a crime. A copy of the search warrant and property receipt evidencing the recovery of the marijuana were posted on Eden's garage door. A few days later Edens, who had been out of town, called Kennedy, who informed him he did not intend to charge him with a crime.

On January 24, 2000 after being contacted by Edens, Charleston Gazette reporter Fanny Seiler wrote an article entitled "Dog fight may have led to pot setup" about an ongoing dispute Edens had with his neighbor Carney Wright and Wright's Rottweiller, as well as the marijuana discovery. Wright was an investigator for the Kanawha County Prosecuting Attorney. Edens related to Seiler that after the dog dispute, "a pot of marijuana plants mysteriously showed up at his house." (Pl.'s Reply, Ex. 7.) In preparing the article, Seiler called Trooper Kennedy, and Kennedy later acknowledged that after Seiler called he wrote the Report on Criminal Investigation on the Edens matter, which he had not completed earlier because it did not lead to a prosecution. The Report was provided to the Kanawha County Prosecutor's Office.

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[1] Edens' later explained he was working on the interior of the house and did not want his tools to be visible to anyone who might look in. Kennedy corroborated there was work being done on the interior of the home when the search warrant was executed.

Edens brought this civil action alleging violations of his constitutional rights under color of state law pursuant to 42 U.S.C. § 1983. In particular, Edens asserts Kennedy's initial entry onto his premises violated his Fourth Amendment rights. Further, he claims the search warrant was obtained using tainted or false information violating the Fourth Amendment, which made the subsequent wrongful entry of his property also violative of his Fourth Amendment rights. Presenting the charges to the prosecuting attorney, "who he [Defendant Kennedy] knew or should have know harbored animus and bias against the plaintiff," sought to prevent or chill his right to petition the government, apparently in violation of his First Amendment rights. Finally, Edens alleges arbitrary police conduct violated the Fourteenth Amendment. The complaint also alleges a state tort claim for trespass. A state claim for invasion of privacy earlier was dismissed based on the applicable statute of limitations. Edens v. Kennedy, Civil Action No. 2:01-0933 (S.D. W. Va. Feb. 13, 2002).

Defendant moved for summary judgment arguing he did not violate Edens' constitutional rights and, in any case, on the basis of qualified immunity.

II. DISCUSSION

A. Summary Judgment Standard and Section 1983 claims

A defendant is entitled to summary judgment on grounds of qualified immunity when there is no genuine issue of material fact and the undisputed facts establish the defendant is entitled to judgment as a matter of law. See Wilson v. Kittoe, ___ F.3d ___, 2003 WL 21693665, at *3 (4th Cir. 2003). Courts emphasize the importance of resolving the qualified immunity question at the summary judgment state

rather than at trial. Id. (citing Saucier, 533 U.S. at 200 (2001))("Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." (internal quotations marks omitted)). The importance of summary judgment in qualified immunity cases does not mean, however, "that summary judgment doctrine is to be skewed from its ordinary operation to give special substantive favor to the defense, important as may be its early establishment." Id. (citing Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992).

B. Qualified Immunity

Qualified immunity analysis is a two-step process. The first question is whether, "taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the defendant's conduct violated a constitutional right." Saucier, 533 U.S. at 201. The second question is whether the right alleged to have been violated was a clearly established right [] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). If either inquiry is answered in the negative, qualified immunity is appropriate.

1. Fourth Amendment Claims

Edens first alleges Trooper Kennedy violated his Fourth Amendment rights when he entered his property without an arrest warrant, search warrant, or other legal authority and conducted an improper search and seizure. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by governmental actors. U.S. Const. amend. IV. The same Fourth Amendment protection that attach to the home also apply to the cartilage.

See Oliver v. United States, 466 U.S. 170 (1984). The curtilage of a home is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of home itself for Fourth Amendment purposes." Id. at 300.

Not every encroachment on a persons' home or yard, however, invokes Fourth Amendment protections. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984); Illinois v. Andreas, 463 U.S. 765, 771 (1983) ("if the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search'[.]") In Alvarez v. Montgomery County, 147 F.3d 354 (4th Cir. 1998), our appeals court stated that officers may enter a person's yard without probable cause if they have a "legitimate reason . . . unconnected with a search of the premises." Id. at 358. While "[r]easonable suspicion cannot justify the warrantless search of a house, . . . it can justify the agents' approaching the house to question the occupants." Rogers v. Pendleton, 249 F.3d 279, 288 (4th Cir 2001)(quoting United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991)). Police may approach a building without committing a search "where a person lacks a reasonable expectation of privacy in the area." Alvarez, 47 F.3d at 357.

The frequently quoted principle first enunciated by the Ninth Circuit states that "[a]bsent express orders from the person in possession against any possible trespass, [anyone may] openly and peaceably, at high noon . . . walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof - whether the questioner be a pollster, a salesman, or an officer of the law." Davis v. United States 327 F.2d 301 (9th Cir. 1964). The "right secured by Tobin and similar cases is the right to 'knock and talk' that is to knock on a residence's

door or otherwise approach the residence seeking to speak to the inhabitants[.]" Rogers, 249 F.3d at 289. "Federal courts have recognized the 'knock and talk' strategy as a reasonable investigative tool when officers seek to gain and occupant's consent to search when officers reasonably suspect criminal activity." United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001).

Trooper Kennedy approached Edens' door to question him about the anonymous tip received. The tip was detailed as to location, the drug, and the supposed manufacturing operation.[2] The question then is whether Edens had reasonable expectations of privacy in his front yard and front porch that were violated by Kennedy's approaching the house. Four factors are considered in analyzing whether a person has a reasonable expectation of privacy in an area of the home: 1) the proximity of the are to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the use of the area ; and 4) the steps taken by the resident to protect the area from people passing by. United States v. Dunn, 480 U.S. 294, 301 (1987).

As pictures in evidence show, the lawn area was extensive. While a fence ran along the road, the house, lawn and porch were all clearly visible from the public road. The fence did not block the view, both because of its open design and because the house sits on a small rise above the road. The open area around the house showed no signs of being put

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[2]Edens raises questions about the tip, suggesting the officer should have inquired whether a meter was actually installed at his home (it was not), and should have questioned the tip once no marijuana was seen from the air. The tipster was not, however, the focus of the officers' reasonable suspicion and the failure to detect marijuana in an aerial survey did not dispel suspicion, but rather supported the tip that plants were being raised indoors.

to any special use or any private use. The porch itself was a concrete slab and was not blocked, screened or protected. According to Trooper Kennedy, the flower pot with marijuana plants was visible from the road, although the plant variety was difficult to identify at the distance and he did not recognized marijuana until he approached the porch. The Dunn factors do not demonstrate Edens had a constitutionally protected expectation of privacy in his yard or front porch.

Edens, however, relies on the locked driveway gate and "No Trespassing" signs,[3] which he believes constitute an express order against any possible trespass. While the driveway lock expressly excludes anyone from driving up to the house, it does not clearly express one may not walk across the lawn to the open and visible porch. The white fence runs only along the front of the lawn and there was a gap or opening at the end of the fence where Kennedy entered the lawn on a direct path to the front porch. Edens says he tried to keep a wooden pallet there to keep cattle from getting out, but acknowledged it may not have been there or may have been lying on the ground. Kennedy says he doesn't remember any pallet there. Finally, Edens says he had two "No Trespassing" signs that were visible from the road, but Kennedy says he saw neither of them.

The fourth Circuit has not addressed the effect of "No Trespassing" signs in the knock and talk context. Relying on the Dunn factors, the Sixth Circuit held a homeowner's Fourth Amendment rights were not violated where officers passed two "No Trespassing" signs to question the occupant. United States v. Hopper, 58 Fed. Appx. 619 (6th Cir. 2003)

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[3] The photo of the house with the signs, admittedly not taken when Kenney was there, appears to show signs with large letters saying "POSTED," rather than "No trespassing."

(unpublished) ("[T]he officers' "trespass" was only relevant in a Fourth Amendment sense if it invaded Appellant's reasonable expectation of privacy.") (quoting United States v. Jackson, 585 F.2d 653, 659-60 (1978)). The Hopper court noted the signs were within visual distance of Hopper's home, the area enclosed was not used for any special purpose, and no special measures were taken to protect the are from open observation. These factors are all present in Edens' case also. Similarly, in United States v. Hall, 153 F.3d 930 (9th Cir. 1998) (unpublished), the court applied the Dunn factors, finding no reasonable expectation of privacy in the curtilage despite "No Trespassing" signs). In United States v. Hammett, 236 F.3d 1054 (9th Cir. 2001), there was no Fourth Amendment violation where officers did not see a no trespassing sign because they entered the property by another route than the driveway. Again this situation parallels Trooper Kennedy's entry on Edens' property. Because Edens' lacked reasonable expectation of privacy in his curtilage, his constitutional rights were not violated by Trooper Kennedy's entry across the lawn to the front porch to knock on the door.

It is well-settled in this circuit that a law enforcement agent does not exceed "the scope of his legitimate purpose for being there by walking around to the back door when he was unable to get an answer at the front door." United States v. Bradshaw, 490 F.2d 1097, 1100 (4th Cir. 1974); see also United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990) (if the front door is inaccessible, there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview the person); Alvarez, 147 F.3d at 358 (officers who seek to talk to the occupant of a home do not necessarily violate the Fourth Amendment by enter the backyard of a dwelling although they have failed to knock at the front door.) Edens

argues that when Kennedy went to the back door, he exceeded his legitimate purpose to knock and talk because he was obviously performing a search. However, the flyover had revealed no marijuana plants outdoors so there was no reason for Kennedy to search. His stated purpose was to try and speak to the occupant because he wished to search the interior of the house for a marijuana growing operation. When no one answered either door, Kennedy went directly to the Magistrate to apply for a search warrant.

Trooper Kennedy's seizure of the marijuana plants from the front porch was constitutional under the plain view doctrine, which allows the seizure of contraband or incriminating evidence that is in plain view to an officer who is lawfully present at the location from which the property can be plainly viewed and has lawful access to the property. Horton v California, 496 U.S. 128, 133, 137 (1990). As noted before, the marijuana was in plain view on the front porch, visible from the public road and clearly identifiable by the officer lawfully walking across the front lawn to knock and talk. The search warrant was not, therefore, tainted by the marijuana, which was lawfully seized.

Edens next questions the validity of the search warrant, based on a report of a purported handwriting expert that the signature of Kanawha County Magistrate Traci Carper is not authentic. Magistrate Carper, however, testified in deposition that she had a specific recollection of reviewing the affidavit for the search warrant and determining that probable cause existed and she had not doubt that her signature on the search warrant was authentic. Under Rule 901, evidence may be authenticated by any method provided by an Act of Congress. Fed. R. Evid. 9120(b)(10). By statute, 28 U.S.C. § 1731, congress has provided, "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine the genuineness of other

handwriting attributed to such person." The talisman and touchstone, is other words, is the admitted handwriting of the writer, against which other documents may be compared. It is an error of logic to argue that comparison with other examples shows the admitted and acknowledged handwriting must be forged. Further, as Defendant notes, the handwriting expert report is not submitted via affidavit pursuant to Rule 56 (3) and so fails to meet the three requirements of the rule: affidavits must be based on personal knowledge, set forth such facts as would be admissible in evidence, and show that the affiants are competent to testify about the matters stated therein. Fed. R. Civ. P. 56(e). For these reasons, Edens fails to raise a question of material fact concerning the validity of the search warrant.

Because Trooper Kennedy did not violate Edens' constitutional rights under the Fourth Amendment, Defendant's motion for summary judgment is **GRANTED** on those claims.[4]

2. First Amendment claims

The parties agree the elements of a First Amendment retaliation claim are;

> First, Plaintiff must demonstrate that his or her speech was protected. Second, Plaintiff must establish that the defendant's alleged retaliatory action aversely

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[4] Edens also claims invasion of privacy contrary to the Ninth Amendment's guarantee of personal liberty rights. The Ninth Amendment, however,. is not the source of any such right. See Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986) ("[T]he ninth amendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim.").

> affected Plaintiff's constitutionally protected speech. Third Plaintiff must demonstrate that a causal relationship exists between his or her speech and defendant's retaliatory action.

Suarez Corp. Industries v. McGraw, 202 F.3d 676, 685 (4th Cir. 2000) (internal citation and quotation omitted). A § 1983 retaliation plaintiff must demonstrate that "the defendant's actions had some adverse impact on the exercise of the plaintiff's constitutional rights." Id. Edens alleges that following his conversation with reporter Fanny Seiler, Kennedy retaliated by providing his criminal report to the prosecutor. According to Edens, somehow Carney Wright, the neighbor with the Rottweiller who worked at the prosecutor's office was implicated in this because "[b]y providing a report to the district attorney's office [sic], where Carney Wright worked, Edens was placed in the reasonable fear that he could be subject to indictment by the biased prosecutor." (Pl.'s Mem. Of Law in Opp'n at 17.)

The first factor is met. The parties do not dispute that Edens conversation with a reporter was protected by the First Amendment. Edens claims the second element is met because the "threat" of prosecution inherent in the report's presentation to the prosecutor chilled his speech. Examining the third or causation element in light of the claim that Kennedy's action was a "threat" clarifies why Plaintiff fails to raise a genuine question of material fact about this alleged retaliation sufficient to present the case to a jury.

Edens claims the causal link is established by the timing of the report, that is, Kennedy did not provide the report to the prosecutor until Fanny Seiler called him. Trooper Kennedy acknowledged the reporter's call prompted him to complete the report and close out his official duties on the case. Simple time concurrence without some further link,

however, is insufficient to prove or even suggest two things are causally related.

Edens' account is that the prosecutor was "biased." Edens was feuding with the prosecutor's investigator, Carney Wright. Edens suspected Wright was behind the pot "set-up." Wright wished to communicate to Edens that he had sufficient influence in the law enforcement community that Edens could be subjected to harassing prosecutions. Kennedy was aware of Edens' allegations about Wright. Wright acknowledged trying to initiate a criminal investigation into Edens using a contact with an investigator for the state attorney general's office (not the prosecutor's office and not Wright). Thus, according to Edens, Trooper Kennedy's submission to the prosecutor was meant to threaten Edens.

Trooper Kennedy testified at deposition that he did not and does not know Carney Wright. With regard to Edens' allegations about Wright, Kennedy said when Edens first called he was really upset and said something "about a dog attacking another do . . . and maybe a land dispute" and Carney Wright's name was mentioned. "I had not idea what was going on," Kennedy testified, although "I since then understand." (Pl.'s Mem., Ex. 2, Kennedy dep. at 178.) Kennedy also testified he was required to submit his report to the prosecutor's office: "Any Criminal Investigative Report that we do is automatically forwarded to the prosecuting attorney." (Id., Ex. 2, Kennedy dep. at 84.) Kennedy's report stated that "no evidence was obtained from within the residence that could possibly link the marijuana in the portable container to being grown within [Plaintiff's] home" and no further prosecutorial action was suggested.

In sum, no evidence supports Trooper Kennedy's having any reason or motive or connection to Wright that might lead him to retaliate against or threaten Edens because of Fanny Seiler's report about the Edens'/Wright feud. No evidence

connects Kennedy to any involvement except that he was the trooper who took the anonymous tip and followed up on it, attempted a knock and talk, obtained a search warrant, and belatedly filed his report. This widespread conspiracy theory is underpinned only by Plaintiff's assumptions and apprehensions, but without supporting evidence it is simply a theory.

The Court **GRANTS** Defendant's motion for summary judgment on Plaintiff's claims his First Amendment rights were violated under color of law.

3. Fourteenth Amendment

The Complaint alleges "arbitrary police conduct serving to harass the plaintiff constitutes a violation of the Fourteenth Amendment. Because there is no evidence of arbitrary police conduct presented, the Court **GRANTS** summary judgment on this issue without further consideration of the legal underpinnings of the claim.

4. State law trespass claims

West Virginia Code § 61-3B-1(8)(a) provides "'Trespass' under this article is the willful unauthorized entry upon, in or under the property of another, but shall not include the following: (a) Entry by the State, its political subdivisions or by the officers, agencies or instrumentalities thereof as authorized and provided by law." Id. Having determined the Trooper Kennedy's actions were lawful under the Constitution of the United States, the Court **FINDS** and **CONCLUDES** this subsection exempts Defendant from any trespass allegations and **GRANTS** summary judgment on the state law claim.

III. **CONCLUSION**

The Court **GRANTS** summary judgment on all claims under the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution as well as allegations of state law trespass. This action is **DISMISSED** and **STRICKEN** from the Court's docket.

The Clerk is directed to send a copy of this Order to Counsel of record by facsimile transmission and first class mail.

Enter: August 6, 2003

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Charles H. Haden II
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ROMIE R. EDENS, JR.,

Plaintiff,

v. CIVIL ACTION NO. 2:01-0933

GEORGE L. KENNEDY,

Defendant.

ORDER DENYING MOTION TO RECONSIDER

Pending is the motion of Plaintiff Romie R. Edens, Jr. (Edens) for the Court to reconsider its grant of summary judgment to Defendant George L. Kennedy on August 6, 2003.

A. **Rule 59(e)**

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to alter or amend a judgment within ten days of its entry. Courts interpreting the rule have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993) (citations omitted). To support a motion for reconsideration

based on new evidence, movant is "*obliged* to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing." Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (citations omitted). "Evidence that is available to a party prior to entry of judgment, therefore, is not a basis for granting for reconsideration as a matter of law." Id.

B. Discussion

Edens does not argue new evidence or a change in the law, but contends the Court failed to consider certain evidence and argument presented with the summary judgment motion and response. Thus he must rely on a clear error of law or manifest injustice in the Court's failure to find a question of material fact sufficient to put the question to a jury as to whether Defendant Trooper Kennedy violated Edens' constitutional rights. Because the Court found no such violation, it concluded Kennedy was entitled to qualified immunity.

Edens contends the Court should have considered the report of purported handwriting expert James Blanco, which challenged the signature of Magistrate Carper on the search warrant. Edens believes the Court was concerned that the authenticity of comparison signatures was not established. (Pl.'s Mot. To Reconsider at 2.) The Court rejected the handwriting expert's evidence because the Magistrate Judge, in her deposition, repeatedly authenticated her own signature on the search warrant itself and said she had not doubts it was her signature and she had signed the document. (See Pl.'s Reply to Def.'s Mot. For Summ. J., Ex. 3, Carper dep. At 40, 55, 64-65.) That she also authenticated the comparison

signatures is irrelevant. Magistrate Carper is an officer of the court who, without hesitation, vouched for the authenticity of her signature on the document in question. In the absence of a substantial showing of fraud on the Court, expert testimony proposing to discredit the Magistrate Judge's assertions about the authenticity and validity of her signature is inadmissible as without foundation, irrelevant and highly prejudicial.

Rule 56(e) request that "affidavits submitted by the party defending against a summary judgment motion contain specific facts, admissible in evidence, from an affiant competent to testify, 'showing that there is a genuine issue for trial.' " 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2740, at 399 (1998) (emphasis added. This evidence fails that test and Edens' argument on that basis is without merit.

Additionally, as Defendant notes, *Rule* 59(e) motions may not be used to raise arguments that could have been raised before the judgment was issued or to argue the case under a new legal theory. (Def.'s Resp. to Pl.'s Mot. To Reconsider at 3 (citing Pacific Ins. Co. v. Am. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998)).) Further, also noted by Defendant, Blanco testified that you could pay a "handwriting expert" to testify to anything and if he were hired by Trooper Kennedy to prove the document was authentic he would point to six similarities that could be used to establish the document was not a forgery. (See id., Ex. 1.)

Finally Edens proposes the jury "may disbelieve" Trooper Kennedy's sworn statement in support of the probable cause for the search warrant. (Pl.'s Mot. To Reconsider at 2.) The issue, instead, is whether Plaintiff has raised a genuine issue of material fact requiring issue be put to a jury, or whether the Court may render judgment as a matter of law. Fed. R. Civ. P. 56(c). Essentially Edens argues that all the actions initially complained of and disposed of in the Court's August 6 Order

never happened. According to Edens, Trooper Kennedy never entered onto Edens' property to conduct a knock and talk, he did not seize the small pot of marijuana plants, he did not circumnavigate the house and knock at the back door and the Trooper's sworn probable cause affidavit was invented. There is no explanation how, if he had not been at the house, Trooper Kennedy knew "All windows in the home have been concealed as if to be growing marijuana inside the home." (Pl.'s Reply to Def.'s Mot. For Summ. J., Ex. 10, affidavit.) However, Edens contends there is an issue whether Trooper Kennedy actually went to Edens' home and recovered the marijuana plants before preparing his affidavit and this falsehood renders the warrant defective.

Trooper Frye accompanied Trooper Kennedy to Edens' home when they initially investigated the tip based on the anonymous phone call Kennedy received. Frye testified in deposition and corroborated Kennedy's story virtually detail for detail about the tip, the drive, the approach to the home, Kennedy's photographing the marijuana plants on the front entrance, his return to the car with the pot of marijuana plants, and a call to "Aviation" to arrange the flyover. (Id., Ex 4, Frye dep. At 25-35.) Edens proposes that because Kennedy's report refers to "this officer," there was only one officer, inconsistent with the testimony. However, it is perfectly reasonable for the reporting officer to refer to himself as "this officer" in the singular, without raising a factual issue as to whether he was unaccompanied, particularly considering corroborating sworn testimony that he was accompanied. Edens also points to Plaintiff's purported "sun and shadow position expert" who provides a letter saying the officer's Polaroid photo could not have been taken on October 6. This letter-form report is not an affidavit, as required by *Rule* 56(e), is not sworn to a reasonable degree of professional certainty, and is

incompetent evidence on a summary judgment motion. Next, Edens argues the plastic pot of marijuana was noted on the property return following execution of the search warrant. But the seizure of the pot, as discussed above, was noted on the affidavit for the warrant and that property was then properly returned with the warrant. Finally, log records do not reveal the first trip to Edens' home at Utah Road. However, Kennedy testified he was not required to log in and out, nor was it policy that he do so, although he assumed he would have "marked out . . . of the cart." (Id., Ex. 2, Kennedy dep. At 44.) Apparently, he did not.

For these reasons and numerous others discussed in the Court's August 6 Memorandum Opinion and Order, Edens failed to raise a genuine issue of material fact that Trooper Kennedy violated his constitutional rights. Edens' motion for reconsideration of the August 6 Order granting summary judgment for Defendant Trooper Kennedy is **DENIED** and the Court **REAFFIRMS** its Judgment Order of the same date.

The Clerk is direct to send a copy of this Order to counsel of record.

ENTER: September 18, 2003

Charles H. Haden II
United States District Judge